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No. 1386

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

E. W. ANDERSON,

Plaintiff in Error.

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court for the District of Alaska, Second Division.

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H. W. HUTTON,
ATTORNEY FOR PLAINTIFF IN ERROR.

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IN THE NINTH CIRCUIT

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STATEMENT OF FACTS.

In this case an indictment of defendant and others was filed by the Grand Jury of the District of Alaska, Division No. 2, on the 28th day of September, 1905, which charged as follows:

"On the 13th day of August, A. D. 1905, in the District aforesaid, did wrongfully, unlawfully and feloniously acting together and without authority of law, with force and violence, make an assault upon John Rigby, Fred Thorpe, Horace Bell, O. L. Green, Scott Burgess and John Bustrom, and having the immediate power of execution so to do, did threaten

to assault with force and violence the said John Rigby, Fred Thorpe, Horace Bell, O. L. Green, Scott Burgess and John Bustrom, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

(Pages 1 and 2 of Transcript.)

A motion was made to set aside the indictment on the ground that it was not endorsed a true bill and was not signed as such by the foreman of the Grand Jury or by the District Attorney. (Page 3 of Transcript.)

The motion was denied and the defendants then demurred to the indictment (Pages 5 and 6 of Transcript), which demurrer was overruled. (Page 7 of Transcript.)

Testimony was introduced, the case argued and submitted, and the jury rendered the following verdict:

> "We, the jury in the above-entiled case, duly impaneled and sworn, find the defendant, E. Anderson, guilty as charged in the indictment.
>
> J. J. McKay, *Foreman.*
>
> Under all the circumstances we earnestly ask that mercy be given the prisoner." (Page 21 of Transcript.)

The verdict was rendered October 20, 1905. (Page 22 of Transcript.)

On October 21, 1905, the defendant moved for a new trial. (Pages 23 and 24 of Transcript.) The motion for a new trial was set for hearing on the Monday following. (Page 25 of Transcript.) Before the argument and de-

cision upon the motion for a new trial, the Court sentenced the defendant to three years' imprisonment in the United States Penitentiary at McNeill's Island. (Pages 26 and 27 of Transcript.)

The defendant subsequently moved the Court to set aside the judgment and sentence for the reason that they were entered while his motion for a new trial was pending. (Pages 29 and 30 of Transcript.)

It appears that the motion for a new trial was set for argument for Saturday, November 4th. (Page 28 of Transcript.) On that day the argument was continued until November 11th. (Pages 31 and 32 of Transcript.)

On November 11th, the motion for a new trial and to vacate the judgment and sentence was submitted. (Pages 32 and 33 of Transcript.)

On November 25th, 1905, the motion for a new trial was denied and also the motion to vacate the judgment and sentence. (Page 33 of Transcript.)

A bill of exceptions was subsequently prepared and a writ of error was applied for and granted.

We believe that several errors appeared in the record.

I.

THE COURT ERRED IN DENYING THE CHALLENGE FOR CAUSE TO JUROR RALPH T. REBER.

The following appears on his voir dire examination on his qualifications to serve as a juror. (Pages 39 to 43 of Transcript.)

(Questioning by Geo. D. Schofield, Esq.)

Q. Mr. Reber, did you ever hear what purported to be the facts of this case?

A. Yes, sir.

Q. Ever read any articles in the newspapers regarding the case?

A. Yes, sir.

Q. From what you read or heard, did you form or express any opinion as to the guilt or innocence of the defendant?

A. Yes, sir, and then I discussed the case with the reporter after the article was written; that is, when I came back from the outside.

Q. Is that opinion such as would require evidence to remove?

A. Yes, it would.

Q. Is it an opinion of a mere fleeting nature or one fixed in its nature?

A. Pretty well fixed.

Q. Require some considerable evidence to remove it, would it?

A. Yes.

Q. Do you believe that with the opinion you now have, you would make a fair and impartial trial juror, knowing the facts, upon this defendant's case?

A. I do not.

Mr. Schofield—Challenge the juror on the ground of bias under the statute.

Whereupon counsel for the Government resisted said challenge and further interrogated said witness as follows:

(Qestioning by Mr. Grigsby.)

Q. Your opinion relates to the guilt or innocence of this defendant?

A. Not of this particular defendant.

Q. You have no opinion as to the guilt or innocence of this particular defendant?

A. Not as to this particular defendant.

Q. Then is there any reason why you should not be a fair and impartial juror in the case of this particular defendant?

A. I am pretty well acquainted with the circumstances.

Q. Have you any conception of the case as far as this defendant's connection with it is concerned?

A. Not individually.

Q. And the opinion you have simply goes to the fact of whether or not there was a riot out there?

A. Yes, sir.

Q. Now, as far as this defendant's guilt or innocence is concerned you could try this case wholly on the evidence, Mr. Reber?

A. I would try to do so, but I don't know.

Q. Any other reason why you would not be a fair juror—have an opinion in the case as to this defendant's guilt or innocence?

A. No, not individually as to this particular defendant.

Q. Well, the fact that an indictment has been returned against him does not raise any presumption in your mind against him, does it?

A. No, sir.

Mr. Grigsby—Well, it seems to me simply a——

Mr. Schofield—Why, he said he did not think, your Honor.

Mr. Grigsby—If the Court please, the juror says he would not be a fair and impartial juror, but the Court is the judge of that; now, he has no opinion whatever as to the guilt or innocence of this particular defendant, simply an opinion as to part of the circumstances of the case.

Mr. Schofield—Why, he said he did not think he would make a fair and impartial juror; he said he did not think so.

Mr. Grigsby—He is not the judge of his qualification.

Mr. Schofield—We insist on our challenge.

(By Mr. Grigsby.)

Q. You have no bias or prejudice against this defendant?

A. No, I have not.

The Court—I think he is a qualified juror. If we would disqualify all those who happen to have some knowledge in regard to these cases coming into the criminal court you wouldn't get qualified jurors; we would get a set of ignorant jurors who did not have intelligence enough to read the papers.

Mr. Schofield—May I be permitted to ask one or two further questions of the juror?

The Court—No, I think his qualifications are good unless you know of some fact—

Mr. Schofield—I ask permission to examine him further—the answer—

The Court—No, he answered explicitly. What is it you wish to ask, then I will determine whether I shall permit it.

Mr. Schofield—I desire to examine the juror further with reference to this opinion he has.

Mr. Reagan—He has answered fully as to his opinion.

The Court—He has answered pretty well. (To Mr. Reber.) You may be sworn at the proper time.

Whereupon, counsel for the defendant then and there objected to the ruling of the Court and exception was then and there allowed. Whereupon, counsel for defendant peremptorily excused the said juror.

II.

THE COURT ERRED IN REFUSING A FURTHER EXAMINATION OF THAT JUROR. (Page 42 of Transcript.)

III.

THE COURT ERRED IN DENYING THE CHALLENGE FOR CAUSE AGAINST JUROR STERNBERG.

The following is his voir dire examination. (Pages 43 to 47 of Transcript.)

(Questioning by Mr. Schofield.)

Q. You heard the statement of this case?

A. Yes, sir.

Q. What is your business?

A. Mining.

Q. Where have you been mining?

A. Nome River.

Q. How far up the river?

A. About seven miles from here.

Q. Mining for yourself?

A. Yes, sir.

Q. Are you an employer of labor?

A. Have not been this year, have been in years past.

Q. Is this your first year in Alaska?

A. No, sir.

Q. How long have you been mining in the District?

A. About four years, five years.

Q. During that time, at any time, have you worked for wages in the District?

A. No, sir—oh, I have, yes, while I was manager of the Cold Storage Company, under wages—at the same time I was mining for myself.

Q. Are you still connected with the Cold Storage Company?

A. No, sir.

Q. Do you believe, Mr. Sternberg, that labor has the same right to associate together for its own protection as capital has a right to associate?

A. Indeed, if they don't interfere with the rights of others.

Q. Would the fact that the defendant here was a member of the Federal Labor Union of Nome bias or prejudice you in any way against him?

A. Not unless that union interferes with others' rights.

Q. Well, suppose the union did interfere with others' rights, would that bias you against this defendant?

A. If he was a member of the union and participated in this unlawful manner, that I consider unlawful, it would.

Q. Would you require positive testimony convincing your mind then, beyond a reasonable doubt, that he had participated, before you would return a verdict of guilty?

A. No.

Q. You would not require that class of testimony?

A. I would have to know that he had not participated. I have a bias if he had participated—if he did not, I have no bias against him.

Q. You would require him to show that?

A. I would be governed by the evidence; if the evidence showed that he had not participated I would not be biased against him.

Q. Then as I understand you, you would require the defendant to show that he had not participated?

A. No, sir, I think I am broad enough to believe that the burden of proof is on the Government to show that he did not participate.

Q. Would you permit the required presumption that the defendant was innocent to follow you all through the

trial until he was proven guilty of the charge by the evidence in the case beyond a reasonable doubt?

A. Yes, sir.

Q. Would you do that knowing him to be a member of that particular union if he should appear—if he is charged jointly with one John Christensen, a member of that union, and that Christensen, a member of that union, and that Christensen has been found guilty?

Mr. Reagan—I object to the question. He doesn't know whether he is a member or not.

Mr. Schofield—It will develop.

The Court—Objection overruled.

(Question read.)

A. The Christensen matter is disposed of and would not enter into my calculations at all.

Q. Now, would the fact that an indictment had been returned against this defendant bias you in any way?

A. Well, it would lead me to think that there was evidence before the Grand Jury that he was one of the participants in the riot.

Q. And that opinion would follow you through the trial, would it?

A. Well, I would want it made clear that he wasn't there.

Q. And you would require him to do that by testimony convincing your mind that he was not there?

A. Yes.

Mr. Schofield—Challange the juror on the grounds of actual and implied bias.

Whereupon George B. Grigsby, of counsel for the

United States, resisted said challenge and questioned the juror as follows:

Q. Now, would you follow the instructions of the Court as to the law?

A. I certainly would.

Q. And if the Court should instruct you that the defendant was entitled to the benefit of the presumption of innocence until his guilt is established beyond a reasonable doubt, you would give him that presumption, would you not?

A. I would.

Q. And you would try the case wholly on the evidence admitted at this trial, would you, and wouldn't allow the fact that the defendant had been indicted to weigh against him?

A. Not in the least.

Whereupon the Court overruled said challenge and an exception was then and there allowed. Whereupon counsel for defendant then and there peremptorily excused said juror.

IV.

IT WAS ERROR FOR THE COURT TO SENTENCE THE DEFENDANT PRIOR TO THE TIME THAT THE MOTION FOR A NEW TRIAL WAS ARGUED AND DECIDED.

See 177; Chapter Nineteen of the Alaska Criminal Code does not contemplate that a defendant may be sentenced while his motion for a new trial is pending, on the contrary it implies that the motion shall be first decided.

It appears that the defendant exhausted the whole of his peremptory challenges.

The juror Reber admitted that he was prejudiced and it was as much a part of the duty of the prosecution to prove that the crime had been committed, as it was to show that defendant was guilty thereof.

The defendant was entitled to all the presumtions.

First: That the crime had not been committed.

Second: That if it had been that he did not participate therein.

Each of the jurors had his mind fixed as to the crime and it was as much a deprivation of the defendant's rights to require him to prove that no crime had been committed, as it would have been to require him to prove that he had no part therein.

The juror Reber said that he had discussed the guilt or innocence of the prisoner and his opinion was well fixed and would require evidence to remove it. (Page 85 of Transcript.)

The witness Sternberg said: (Page 46 of Transcript)

"Well, I would want it made clear that he was not there."

Q. And you would require him to do that by testimony convincing your mind that he was not there?

A. Yes.

We submit that neither were qualified jurors and the Court erred in compelling defendant to challenge them peremptorily.

V.

THE COURT ERRED IN GIVING THE FOLLOWING INSTRUCTION:

(Page 18) "As regards the alibi relied upon by the defendant in this case, I now instruct you that an acquittal of the defendant will be justified by the law, *if the evidence touching the alibi,* after being carefully weighed and tested by you, and having been fairly considered by you in connection with all the other evidence in the case, *shall raise in your minds a reasonable doubt of his guilt of the crime charged.*"

In that charge the Court directly charged the jury that the defendant was guilty and the only purpose for which they could consider his evidence as to his being somewhere else was to raise in their minds a reasonable doubt of his guilt.

Or, in other words, the defendant is guilty, but if the evidence touching the alibi shall raise in your minds a reasonable doubt of his guilt, you may acquit him.

What the Court intended to say was that if after the consideration of all the evidence, including that of the alibi, you shall have a reasonable doubt of the guilt of the defendant, you may acquit. But it did not say that, the language means but one thing, that is, it requires the evidence touching the alibi to produce the reasonable doubt of guilt.

An almost identical instruction was held erroneous in *State* v. *McCracken,* 66 Iowa, 569.

The instruction also practically told the jury that the burden of proof had shifted, which was error.

People v. *McWhorter,* 93 Mich. 641;
People v. *Hurley,* 57 Cal. 145;
Coffin v. *United States,* 156 U. S. 461.

VI.

THE COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION OR INSTRUCTIONS UPON THE WEIGHT OF AN ALIBI, REQUESTED BY DEFENDANT, (Pages 81-82 of Transcript) as follows:

"The defense interposed by the defendant Anderson in this case is what is known as an alibi—that is, that the defendant was at another place at the time of the commission of the crime charged, and the Court now instructs you that such defense is as proper and legitimate, if proved, as any other, and all of the evidence bearing upon that point should be carefully considered by the jury, and if, in view of all the evidence, the jury has any reasonable doubt as to whether defendant was in some other place or places, than at the place indicated in the indictment when the crime was committed, should you find a crime was committed, you should give the defendant Anderson the benefit of that doubt and find him not guilty."

"Where the defense is an alibi as in this case, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal."

It is sufficient if the evidence upon that point raises a reasonable doubt of his presence at the time and place of the commission of the crime charged, and if upon the evidence there is upon the minds of the jury a reasonable doubt as to whether or not the defendant Anderson was

present at the time and place mentioned in the indictment, you should give him the benefit of the doubt and find him not guilty.

There is no doubt that the instructions and each thereof are sound law, and no equivalent for them or each thereof was given.

VII.

THE DEFENDANT WAS ENTITLED TO THE FOLLOWING INSTRUCTION (Page 82 of Transcript):

"Under the law no jury should convict a defendant of a crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there is strong reason to suspect he is guilty, but before the jury can lawfully convict they must be convinced by the evidence in the case beyond a reasonable doubt that he is guilty, and unless you so believe you should acquit the defendant Anderson."

The defendant was entitled to that instruction and no equivalent was given for it.

VIII.

THE JUDGMENT IN THIS CASE IS WITHOUT JURISDICTION.

The indictment is found under the following language of Section 111 of the Alaska Penal Code:

"That any use of force or violence, or any threat to

use force or violence, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot."

The second subdivision of Section 112 reads:

"If such person carried at the time of such riot any species of dangerous weapon, or was disguised, or encouraged or solicited other persons who participated in the riots to acts of force or violence, such person shall be punished by imprisonment in the penitentiary not less than three, nor more than fifteen years."

Subdivision three reads:

"In all other cases such persons shall be punished by imprisonment in the County Jail, not less than three months nor more than one year, or by fine not less than fifty nor more than five hundred dollars." The indictment charges but the use of force and violence.

It does not charge the carrying of a dangerous weapon, nor that the defendant was disguised, nor that he encouraged or solicited other persons who participated in the riots, to acts of force or violence.

The indictment being framed under the first part of Section 111 and not charging the acts mentioned in the second subdivision of Section 112, the Court could not order the punishment specified therein, nor that it imposed in this case, the sentence being imprisonment in the United States Penitentiary at McNeill's Island for the period of three years and three calendar months. (Page 26 of Transcript.)

If dangerous weapons were used, their use was a question of fact for the jury. The Court could not take an

indictment framed under one state of facts and then find for itself a fact not charged in the indictment upon which to base a sentence, in fact, the Court could find no fact in the case at all.

Section 110, Alaska Code of Criminal Procedure.

Article VI, Amendments to the U. S. Constitution.

If the defendant had been indicted, tried and found guilty of manslaughter, the Court could not sentence him to be executed because it thought that the evidence showed the crime to be murder, but the Court did that in substance in this case.

The defendant was tried and found guilty of misdemeanor and sentenced for a felony.

A full discusssion upon the requisite of an indictment is to be found in Vol. I, Bishop's New Criminal Procedure, Sections 77-88.

Section 77 reads in part as follows:

"That every wrongful fact with each particular modification thereof which in law, is required to be taken into the account in determining the punishment upon a finding of guilty must be alleged in the indictment."

Section 84 reads in part as follows:

"The Court, in adjudging the punishment, or the jury in assessing it as is done in some of our States, can take into its consideration nothing, except what is specifically charged."

Section 184, Alaska Penal Code;

Ballew v. *U. S.*, 160 U. S. 187;

In re Bonner, 151 U. S. 242.

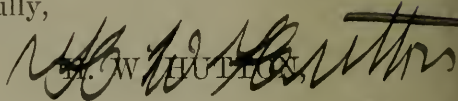
IX.

Instruction No. 3 (Pages 14 and 15 of Transcript) does not state the law.

An assault is an attempt coupled with a present ability to commit a violent injury on the person of another. The above instruction says nothing about a present ability and under it, a person making a gesture at another, any distance away would be guilty of an assault.

We submit that a new trial should be granted herein and as the defendant was imprisoned and forwarded to McNeill's Island immediately after judgment and has been there ever since and has thus served a longer term in the Penitentiary than he could have lawfully been sentenced to serve in a County Jail, that he should be ordered immediately released.

Respectfully,



Attorney for Plaintiff in Error.